IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1693

STANLEY BLACKLEDGE, Warden, *et al.*,

Petitioners,

v.

GARY DARRELL ALLISON,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

In respondent's view the question presented by the writ of certiorari in this case should be phrased as follows:

> WHETHER A STATE PRISONER WHO ALLEGES THAT HIS OFF-THE-RECORD PLEA BARGAIN WAS BREACHED BY THE STATE IS ENTITLED TO AN EVIDENTIARY HEARING IN FEDERAL HABEAS CORPUS, WHERE THE ONLY INQUIRY AT TRIAL AS TO THE

EXISTENCE OF ANY PLEA BARGAIN WAS A SINGLE QUESTION AS TO WHETHER ANY "PROMISE OR THREAT" HAD BEEN MADE TO INFLUENCE THE DEFENDANT TO PLEAD GUILTY.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent submits that, in addition to the provisions cited by Petitioners, the following are also applicable to his case:

United States Constitution, article I, section 9, clause 2:

> The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public safety may require it.

North Carolina General Statutes, sections 15A-1021 to -1027 (1973) (reproduced in Appendix "A" to brief, infra).

STATEMENT OF THE CASE

The statement of the facts by Petitioners is correct so far as it goes, but the following facts are also material to an understanding of the issues presented:

The respondent, Allison, was indicted for three offenses: felonious breaking and entering, safe-cracking, and possession of burglary tools (App. 9-10). At the time of the alleged offense and the plea, safecracking was punishable by imprisonment from ten years to life, N.C. Gen. Stat. §14-89.1; the other crimes were punishable by a maximum of ten years' imprisonment.

At his initial arraignment on January 24, 1972, Allison, represented by court-appointed counsel, entered

pleas of not guilty in each case. During a recess, however, he agreed to change his plea upon being informed that his co-defendant had agreed to plead guilty and would be available to testify against him (App. 3). Allison therefore entered a plea of guilty to the charge of attempted safecracking; the record does not reflect the exact disposition of the remaining charges, but presumably they were dismissed since they were referred to in the "Adjudication" portion of the plea transcript (App. 12).

The plea-taking procedure was conducted in accordance with then-applicable North Carolina law, by the Clerk's recording the defendant's oral answers to a series of questions contained in a printed form (see Appendix "B" to brief, infra). Of the thirteen questions, the only ones arguably designed to bring to light any plea arrangement were number eight, relating to the maximum sentence that the offense carried, and number eleven: "Has the Solicitor, or your lawyer, or any policeman, law officer or anyone else made any promise or threat to you to influence you to plead (guilty) (nolo contendere) in this case?" Respondent's recorded answer to this question was "No" (App. 12).

The reverse of the plea form was headed "Adjudication," and consisted of printed findings of fact with spaces for the clerk to insert the names of the defendant and his attorney, and the offenses with which he was charged and those to which he pled guilty. The trial judge simply signed the form in the space provided after reading the questions to the defendant.

In Allison's case, sentence was not imposed immediately but was delayed until January 27, 1972, when he was sentenced to a prison term of seventeen to twenty-one years (App. 14). The record does not reveal what was said by anyone at the sentencing proceeding. His co-defendant, Dana Eugene Laster, received a

sentence of five to eight years (less than the statutory minimum), according to the allegations of respondent's letter to the district court and Laster's own written statement (App. 24, 30).

Allison did not appeal his conviction (he alleged as one of his grounds for habeas relief that he was not informed of his right to appeal), but instead applied to the state courts under North Carolina post-conviction procedures, alleging that he had been told by his attorney of a plea agreement with the state whereby he would receive the minimum sentence of ten years in return for his plea. Allison's petition was denied by the superior court on November 30, 1972, without a hearing, and the North Carolina Court of Appeals denied *certiorari* in an unpublished order dated January 16, 1973 (para. 16 of habeas corpus petition, p. 8a of Appendix in the court below).

Allison then turned to the federal courts for relief and on February 15, 1973, filed a verified *pro se* (though apparently with some assistance from a prison writ-writer) petition for writ of habeas corpus with the United States District Court. In the petition, Allison alleged that his attorney had represented to him that if he pled guilty, he would receive only the minimum sentence of ten years, which agreement had been approved by the prosecutor and the judge, and that if Allison wanted the plea to be accepted, he would have to answer the court's questions as the attorney instructed. The district court, however, construed the petition to allege only a lawyer's erroneous prediction and summarily dismissed it (App. 15-16). Upon Allison's motion for rehearing, the district judge, apparently recognizing his error, referred the case to a magistrate, who entered an order requiring Allison to submit within thirty days an affidavit of the person who Allison claimed had witnessed the attorney's

promise, and other proof of his allegation. In response, Allison wrote the district judge and requested the court's assistance, saying that Laster, his co-defendant, had a statement but was unable to have it notarized because he was incarcerated at another prison unit. A second letter to the court claimed that Allison's mother had written him saying that Laster's statement has been destroyed by the prison notary, and that Laster had also prepared a statement verifying the destruction of the affidavit, but that Allison had never received the statement. Allison asked the court to "check into this," since it was the only way he had of meeting the magistrate's order, and suggested that personnel at Laster's prison unit were attempting to hinder his efforts to obtain relief (App. 21-22).

The district court clerk then wrote Allison and suggested that he obtain an affidavit from anyone with knowledge that a notarized statement had been destroyed, and that he also submit, in lieu of an affidavit, his co-defendant's handwritten statement of the facts, together with a detailed description of his efforts to have the statement notarized (App. 23). Apparently frustrated in his efforts to comply with the court's requests, Allison wrote the district judge some two months later complaining of the disparity in the sentences meted out at trial, and stating that he had heard Laster was reluctant to make a statement for fear of being penalized in such privileges as parole and work-release. Laster, said Allison, should be brought to court and examined about the matter under oath (App. 24).

Instead, the magistrate recommended that the petition again be dismissed, concluding that Allison has been given "ample opportunity" to support his allegations of an unkept plea bargain, and the court dismissed the action (App. 25-27).

Allison next filed a verified motion for reconsideration, in which he alleged difficulty in obtaining sworn statements from Laster due to the "locations of incarceration" of Laster and to "mail difficulties." However, said Allison, he had finally been able to obtain a statement from his witness, and he attached to the motion a statement, purportedly signed by Laster and witnessed by three other persons, corroborating his contention that his attorney had informed him of a bargain with the judge and the prosecutor for ten years (App. 28-30). The district judge denied the motion and ordered the action closed, noting that instead of an affidavit, Allison had submitted "simply an unnotarized statement by petitioner's co-defendant" (App. 31).

On appeal, the Court of Appeals remanded the case to the district court for an evidentiary hearing into the merits of Allison's claims, holding also that a *pro se* petitioner is not to be put to a greater burden than any other plaintiff to obtain an evidentiary hearing when he has alleged facts which, if proved, would entitle him to relief, and that the magistrate had therefore erred in requiring an affidavit from the prisoner's incarcerated witness before considering his petition for reconsideration on its merits. *Allison v. Blackledge*, 533 F.2d 894 (4th Cir. 1976). Upon the state's petition, a writ of certiorari was granted by this Court to review that decision.

SUMMARY OF ARGUMENT

A state prisoner who alleges in a federal habeas corpus petition that his court-appointed attorney induced his plea of guilty by representing to him that he had secured the agreement of the judge and the prosecutor to a lesser term of imprisonment than the

prisoner actually received is entitled to an opportunity to prove his claim in an evidentiary hearing. The requirement that he be given a hearing is not fulfilled by the trial judge's question at the arraignment itself as to whether any promises or threats had influenced the plea, particularly when the prisoner alleges that he was instructed to answer the question in the negative in order to have his plea accepted by the court. Such formalistic recitations were inherently unreliable prior to the widespread acceptance of court decisions legitimizing plea bargaining and the institution of procedures designed to induce full disclosure of plea arrangements and their incorporation into the record of the proceeding.

Since North Carolina has legislatively remedied the former procedure affected by this appeal, a decision in Allison's favor will not burden the state or damage federal-state relations.

An indigent state prisoner should not be required to submit affidavits from others in support of his sworn petition in order to be entitled to a hearing. Such a rule serves no useful purpose in the ultimate resolution of the dispute and is unfair when applied only to this particular class of litigant.

ARGUMENT

I.

THE HABEAS CORPUS PETITION SUFFICIENTLY STATED A CLAIM FOR RELIEF.

The writ of habeas corpus is the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action. Its

> pre-eminent role is recognized by the admonition in the Constitution that: 'The Privilege of the Writ of Habeas Corpus shall not be suspended . . . .' . . . The scope and flexibility of the writ – its capacity to reach all manner of illegal detention – its ability to cut through barriers of form and procedural mazes – have always been emphasized and jealously guarded by courts and lawmakers. The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected.

Harris v. Nelson, 394 U.S. 286, 290 (1969).

Imprisonment pursuant to a plea of guilty that was induced by the unkept promise of a certain minimum sentence may be collaterally attacked in federal habeas corpus. *Machibroda v. United States*, 368 U.S. 487 (1962); *Santobello v. New York*, 404 U.S. 257 (1971). Relief is granted on the theory that a plea thus induced is deprived of its character of a voluntary admission of guilt, an act of free will. *Machibroda*, supra, 368 U.S. at 493. See generally Note, *The Legitimation of Plea Bargaining: Remedies for Broken Promises*, 11 Am. Crim. L. Rev. 771, 785-90 (1973). The standard as to the voluntariness of guilty pleas has been stated as follows:

> A plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by . . . misrepresentation (including unfulfilled or unfulfillable promises) . . . .

Sheldon v. United States, 246 F.2d 571, 572 n.2 (5th Cir. 1957), quoted with approval in *Brady v. United States*, 397 U.S. 742, 755 (1970).

In *Machibroda* the alleged promise was conveyed to the defendant by an assistant United States Attorney, who claimed to represent the U.S. Attorney and to have secured the trial judge's agreement to the bargain. The Court held that Machibroda was entitled to a hearing on his allegations, as improbable as they were in that particular case. The *Machibroda* rule has not, however, been limited in its application to allegations of promises made by prosecutors, judges, or law enforcement officers. The representation made to a criminal defendant by his attorney that there exists a pre-arranged agreement as to the sentence he will receive in return for his plea of guilty is equally effective in depriving a plea of its character as a voluntary act. Claims of such representations have been held sufficient to raise issues of fact precluding summary dismissal of habeas corpus petitions. See, e.g., *Edwards v. Garrison*, 529 F.2d 1374 (4th Cir. 1975), *cert. denied*, ____ U.S. ____ (1976); *U.S. ex rel. Hill v. Ternullo*, 510 F.2d 844 (2d Cir. 1975); *United States v. Hawthorne*, 502 F.2d 1183 (3d Cir. 1974); *United States v. Valenciano*, 495 F.2d 585 (3d Cir. 1974); *Roberts v. United States*, 486 F.2d 980 (5th Cir. 1973); *Walters v. Harris*, 460 F.2d 988 (4th Cir. 1972) (by implication), *cert. denied*, 409 U.S. 1129 (1973); *Moorhead v. United States*, 456 F.2d 992 (3d Cir. 1972); *Zekelkeyzula v. Patterson*, 373 F.2d 522 (10th Cir. 1967) (per curiam). But see *Frank v. United States*, 501 F.2d 173 (5th Cir. 1974); *Moody v. United States*, 497 F.2d 359 (7th Cir. 1974); *Bryan v. United States*, 492 F.2d 775 (5th Cir. 1974).

Examination of the above-cited cases will reveal that in each the claims raised were similar in substance to the allegations of the petitioner in the instant case. Thus, in *Edwards* the claim was that Edwards was told of a plea bargain for twenty years, rather than the thirty to life he received; in *Ternullo* the petitioner

claimed to have been told by his attorney that the maximum sentence he would receive would be four years (he received fifteen); In *Zekelkeyzula* the allegation was that the prisoner's attorney had represented to him that a "deal" had been made for probation; in *Valenciano* petitioner's attorney supposedly transmitted to him the contents of an agreement with the U.S. Attorney for concurrent sentences with no special parole term to follow; in *Moorhead* the petition alleged that Moorhead had been assured by his attorneys that there was a "proposition" for a suspended sentence or probation; *Hawthorne* involved an attorney's promise for a five-year sentence; in *Roberts*, the prisoner, complaining of his seventy-five year sentence, alleged that his attorney had told him that a bargain had been struck for fifteen years; and in *Walters* the petitioner alleged a bargain made through his attorney with an Assistant U.S. Attorney for a ten-year sentence (he received two concurrent twenty-year terms). In each of the above cases, summary disposition was held inappropriate.

Allison alleged in his petition that his guilty plea "was induced by an unkept promise" (App. 2), and that he was led by his court-appointed counsel, M. Glenn Pickard, to believe that Pickard had "talked the case over with the Solicitor and the Judge, and that if the petitioner would plea [sic] guilty, he would only get a 10 year sentence of penal servitude" (App. 2-3). Elsewhere in his petition Allison referred to the agreement in terms of an "unkept bargain" and a "promise" (App. 3, 4), and claimed to have a witness to the conversation between him and his attorney.

In dismissing Allison's initial application, the district court merely stated the undisputed rule that "[p]redictions of counsel of the duration of a sentence, without more, are not grounds for attacking an otherwise valid plea of guilty. *Swanson v. United States*, 303 F.2d 865

(8th Cir. 1962)" (App. 15). See also *Masciola v. United States*, 469 F.2d 1057 (3d Cir. 1972); *Johnson v. Massey*, 516 F.2d 1001 (5th Cir. 1975) (semble). But Allison's claim was of more than a lawyer's mere prediction based upon his experience in the trial of cases or his asserted familiarity with the sentencing habits of the particular judge involved. Allison alleged a *bargain* between the prosecution and the defense for a specified term of imprisonment in exchange for a plea of guilty, and that the agreement was breached. Such an allegation is easily distinguishable from precedent such as *Masciola*, where "the only claim . . . [was] that counsel inaccurately predicted the sentence." 469 F.2d at 1059. "A fundamental distinction exists between an allegation of counsel's erroneous prediction of sentence as in *Masciola* and an allegation of a bargained sentence as in *Moorhead*." *United States v. Valenciano*, 495 F.2d 585, 588 (3d Cir. 1974).

Petitions of indigent prisoners proceeding *pro se* under the federal habeas corpus statutes are to be construed liberally, so as to do substantial justice. *Holiday v. Johnston*, 313 U.S. 342, 350 (1941) ("A petition for habeas corpus ought not to be scrutinized with technical nicety. Even if it is insufficient in substance it may be amended in the interest of justice."); *Walters v. Harris*, 460 F.2d 988, 991 (4th Cir. 1972). Cf. *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972) (rule applied to prisoner's 42 U.S.C. §1983 complaint).

> We recognize that prisoner complaints often seem annoying and insubstantial, and that the volume of such complaints faced by most district courts would try the patience of Job. Job-like patience, however, should be the judicial benchmark in this area. Technical rigidity in reviewing pleadings must be eschewed, and we must remain extremely

> tolerant of the juristically unlearned as they seek to articulate their belief that they have suffered deprivations of constitutional rights.

Covington v. Cole, 528 F.2d 1365, 1373 (5th Cir. 1976) (Goldberg, J., in context of 42 U.S.C. §1983 action).

Judged by this standard, and construed in light of the above-cited precedent, it is submitted that Allison's petition was sufficient to withstand a summary adverse adjudication.

II.

HAVING STATED A CLAIM FOR RELIEF, RESPONDENT WAS ENTITLED TO AN EVIDENTIARY HEARING TO PROVE THE TRUTH OF HIS ALLEGATION.

The beginning point of analysis in determining whether to grant an evidentiary hearing in habeas corpus must be *Townsend v. Sain*, 372 U.S. 293 (1963). The Court in that case examined the power of federal courts to determine issues of fact arising from applications for relief from state court convictions; by "issues of fact," the Court meant "what are termed basic, primary, or historical facts: facts 'in the sense of a recital of external events and the credibility of their narrators . . . .'" 372 U.S. at 309 n.6 (quoting from *Brown v. Allen*, 344 U.S. 443, 506 (1953)). The Court found that such power existed.

The Court then turned to the considerations that may make mandatory the exercise of the power of a federal court to receive evidence:

> The appropriate standard . . . is this: Where the facts are in dispute, the federal court in habeas corpus must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of trial or in a collateral proceeding. In other words, a federal evidentiary hearing is required unless the state-court trier of fact has after a full hearing reliably found the relevant facts.

373 U.S. at 312-13. See also *Harris v. Nelson*, 394 U.S. 286, 291 (1969) ("It is now established beyond the reach of reasonable dispute that the federal courts not only may grant evidentiary hearings to applicants, but must do so upon an appropriate showing").

The right to an evidentiary hearing in the situation at bar, *i.e.*, an allegation of a broken plea bargain, was determined to exist in *Machibroda v. United States*, 368 U.S. 487 (1962). There the Court noted that the petition's allegations of fact, which were put in issue by the Government's affidavit in response, related primarily to purported occurrences outside the courtroom, on which the record could cast no light. Nor, said the Court, were the circumstances alleged of a kind that the district judge could resolve by drawing upon his own personal knowledge or recollection. 368 U.S. at 494-95. Despite the lack of eyewitnesses to those occurrences in Machibroda's case, a hearing was required.

The courts of appeals of several circuits have reached the same result, requiring an evidentiary hearing where allegations of plea bargaining raise issues of fact outside the record. See, e.g., *United States ex rel. Hill v. Ternullo*, 510 F.2d 844 (2d Cir. 1975); *Hillard v. Beto*, 494 F.2d 35 (5th Cir. 1974); *United States v. Gonzalez-Hernandez*, 481 F.2d 650 (5th Cir. 1973); *Schoultz v. Hocker*, 469 F.2d 681 (9th Cir. 1972); *Gallegos v. United States*, 466 F.2d 740 (5th Cir. 1972); *Macon v. Craven*, 457 F.2d 343 (9th Cir. 1972); *Moorhead v. United States*, 456 F.2d 992 (3d Cir.

1972); *Zekelkeyzula v. Patterson*, 373 F.2d 522 (10th Cir. 1967) (per curiam); *United States v. Glass*, 317 F.2d 200 (4th Cir. 1963). See also cases cited in Brief for Petitioners at 18 n.5.

Even where the petitioner's allegations are highly improbable, a hearing has been required, to give him the opportunity to offer supporting proof. Thus in *Del Piano v. United States*, 362 F.2d 931, 933 (3d Cir. 1966), the court held: "No matter how improbable or unbelievable the verified allegations of the motion [to vacate sentence] may seem, the movant cannot be denied a hearing." And in *United States v. Valenciano*, 495 F.2d 585 (3d Cir. 1974), the court noted the "formidable barrier," in light of the petitioner's answers during the Rule 11 plea inquiry, faced by petitioner in claiming a plea bargain, but nevertheless held him entitled to an opportunity to prove his claims, which were directed to evidentiary matters outside the record. In *Machibroda* itself, the petitioner's claim strained credulity, 368 U.S. at 498-501 (dissenting opinion of Mr. Justice Clark). The majority nevertheless required a hearing.

Cases seeming to hold otherwise can be distinguished. Thus in *Bryan v. United States*, 492 F.2d 775 (5th Cir. 1974), the court held that no hearing was required where both the defendant and his attorney had testified "without conflict or equivocation" in a particularly extensive rule 11 examination that no plea bargain had been made or promised, directly or indirectly. The court stated, "No per se rule can be applied, for in the final analysis, the issue becomes one of fact. Its resolution necessarily depends upon what is alleged and what is shown by the documentation of each case." 492 F.2d at 778. Bryan had alleged that the judge in the court below was a party to the bargain. The court noted that "[a]ll of the material issues raised by Bryan

are ones the judge, who was required by section 2255 to hear the motion, could readily resolve by drawing on his own personal knowledge and recollection." *Id.* at 779. Judge Goldberg, joined by five members of the *en banc* court, dissented from the denial of an evidentiary hearing, offering a persuasive comparison of Bryan's allegations to those of Machibroda. *Bryan* was followed in *Frank v. United States*, 501 F.2d 173 (5th Cir. 1974), a case involving similar facts (full rule 11 inquiry, including an express denial as to the existence of any plea bargain).

Moody v. United States, 497 F.2d 359 (7th Cir. 1974), is also distinguishable. In *Moody*, a federal defendant submitted a *pro se* petition for reduction of his sentence some three months after his sentencing; the petition alleged that the plea of guilty had been coerced by defendant's attorney in offering a ninety-day sentence followed by probation, and that the judge was "in on the deal." In a later petition, the defendant claimed the bargain had been for a nine-month sentence. The court of appeals affirmed the district court's order dismissing the petition without a hearing, concluding that Moody had not alleged "the detail required to be alleged" to be entitled to a hearing. No other reasons for the holding were furnished in the court's opinion. *Moody* is distinguishable from the case at bar in that it presented a case where the habeas judge could draw upon his own recollection in passing upon the petitioner's allegations, as could the judge in *Bryan*. The decision does not stand for the proposition that a properly pleaded claim of a broken plea bargain would not require a hearing to determine the truth of the facts alleged.

It is true that *Walker v. Johnston*, 312 U.S. 275 (1941), and *Machibroda*, as well as some of the circuit court decisions, arose out of petitions for relief by federal prisoners under 28 U.S.C. §2255 or its

predecessor, and that the decisions in those cases relied at least in part on the mandatory language of that statute. But numerous other decisions, acting without the explicit statutory guidance of §2255, have, by applying the policy behind the rule, reached the same result in considering petitions by state prisoners. E.g., *United States ex rel. Hill v. Ternullo*, 510 F.2d 844 (2d Cir. 1975); *Hillard v. Beto*, 494 F.2d 35 (5th Cir. 1974) ("[E]ven the most conservative reading of the factual allegations of petitioner's §2254 complaint shows that he is claiming to be the victim of a broken plea bargain, but there has been no factual hearing to determine whether this claim is supported"); *Schoultz v. Hocker*, 469 F.2d 681, 682 (9th Cir. 1972) (petitioner "entitled to evidentiary hearing for the determination of the truth or falsity of the allegation as to the alleged promise"); *Macon v. Craven*, 457 F.2d 342 (9th Cir. 1972) (accord); *Zekelkeyzula v. Patterson*, 373 F.2d 522 (10th Cir. 1967) (accord). And, of course, the plain and direct language of *Townsend*, further implemented by Congress in 28 U.S.C. §2254, provides a clear mandate for a hearing in state prisoner cases.

The reasoning followed in the federal-prisoner cases applies with equal force to petitions by prisoners in state custody; in either case, allegations of the existence of an off-the-record plea bargain and its violation raise issues of fact which cannot be resolved by an examination of the record, or even by submission of affidavits. And if hearings are required in petitions from federal convictions, with the protection of the generally thorough rule 11 inquiry, then a state prisoner, whose plea is usually taken without benefit of so searching an examination as that of the federal practice (as evidenced by the reported decisions), surely ought to be entitled to a hearing on his claim that his plea was coerced. See generally *Davis v. North Carolina*, 313 F.2d 904 (4th Cir. 1962), and cases therein cited.

What the Court in *Kaufman v. United States*, 394 U.S. 217 (1969), said of federal prisoners might be equally applied to state petitioners in habeas corpus:

> The opportunity to assert federal rights in a federal forum is clearly not the sole justification for federal post-conviction relief; otherwise there would be no need to make such relief available to federal prisoners at all. The provisions of federal collateral remedies rests more fundamentally upon a recognition that adequate protection of constitutional rights relating to the criminal trial process requires the continuing availability of a mechanism for relief. This is no less true for federal prisoners than it is for state prisoners.

394 U.S. at 226.

The State, however, apparently conceding that Allison was entitled to some type of hearing on his allegations, argues that the arraignment itself was the "full and fair evidentiary hearing" into the merits of his constitutional claim required by this Court in *Townsend* and by Congress in §2254, and that the printed form offered by the state as the only record of that hearing constitutes the "reliable and adequate written indicia" of such a determination referred to in the statute. This is surely among the strangest of the state's contentions in this case, yet because the state is forced to build its entire argument entirely upon that proposition, it bears closer analysis, if only because of its beguiling simplicity.

Allison alleged he was the victim of a broken plea bargain with the state, the bargain having been relayed to him through the mediation of his counsel, who further instructed him in the manner in which the court's questions were to be answered if the bargain were not to be jeopardized by disclosure in open court. That is the claim which, under *Townsend*, requires a full hearing in some tribunal if adjudication in the

federal district court is to be avoided, and "[t]here cannot even be the semblance of a full and fair hearing unless the state court actually reached and decided the issues of fact tendered by the defendant." *Townsend*, 372 U.S. at 313-14. See *Boyd v. Dutton*, 405 U.S. 1 (1972) (state post-conviction proceeding record held an inadequate development of the material facts in issue; error for federal district court to deny relief without evidentiary hearing); *Lane v. Henderson*, 480 F.2d 544 (5th Cir. 1973) (state evidentiary hearing not "full and fair" where only evidence presented was minutes of plea); *Hawkins v. Bennett*, 423 F.2d 948 (8th Cir. 1970) ("meaningful presentation of petitioner's claims" is required); *Anthony v. Fitzharris*, 389 F.2d 657 (9th Cir. 1968) (held, transcript of state-court plea proceedings not a sufficient hearing under §2254 as to claim of involuntariness to entitle it to presumption of correctness).

It is difficult to understand how the judge's questions themselves and his "finding" of voluntariness in a pre-printed form could be considered a "determination after a hearing on the merits" of Allison's claim of an off-the-record agreement; when the formalistic inquiry was made, Allison had not been sentenced and no bargain had yet been broken. Yet the state, in Catch-22 fashion, now urges that the "hearing" can precede the events to be heard. The authority cited at pages 15-16 of petitioners' brief in support of that proposition is easily distinguisable, and the reasons advanced for the adoption of such a harsh rule, examined infra, do not withstand scrutiny.

In any event, even if the plea proceeding itself were considered to be a determination into the merits of Allison's claim, evidenced by reliable indicia, that would not end the matter, since such a determination raises only a presumption of correctness which may be

rebutted by the petitioner; it is not a conclusive adverse adjudication. Further, Congress has provided that the presumption shall not apply if any one of several factors (taken mostly from the opinion in *Townsend*) are present, and at least four of those factors are present in Allison's case: (1) the merits of his claim that his answers were false and were part of the *sub rosa* agreement have never been resolved in any tribunal; (2) the form questions of the plea transcript were not a fact-finding procedure adequate to afford a full and fair hearing, as not one of them inquired expressly into the existence of any plea bargain or expectation of leniency, or indicated that such arrangements could be disclosed without fear of judicial sanction; (3) the "material facts" were not adequately developed at that hearing, for the above reasons and for the additional reason that plea bargains have traditionally been shrouded in secrecy, as will be developed infra; and (4) the mere recital of the questions on the form – which is all that appears on the present record – is not a "full, fair, and adequate hearing" into the claim of a broken plea bargain. 28 U.S.C. §2254(d)(1)-(3), (6). Allison therefore did not bear the burden of showing that any such factual determination was erroneous in order to be entitled to federal consideration of his claim.

Furthermore, disclaimers of plea bargains at arraignment are inherently unreliable:

> At the more formal part of the pleading process, the in-court appearance at which the defendant enters his plea, the parties typically act as if no prior negotiations had occurred. Trial judges, although they are aware that negotiation for pleas is a common practice, routinely ask the defendant whether any promises have been made to him. Notwithstanding the fact that the plea has been the subject of negotiation, the defendant usually

answers in the negative, and the prosecutor and defense counsel seldom indicate to the contrary.

> If the judge, the prosecution, or the defense counsel makes a statement in open court that is contrary to what he has been led to believe, especially as to promises by the prosecutor or his defense counsel, . . . [the defendant] would no more challenge that statement in open court than he would challenge a clergyman's sermon from the pulpit.

Trebach, *The Rationing of Justice* 159-60 (1964). As a result, the negotiation process remains largely invisible, informal, and not subject to any systematic control.

American Bar Association Project on Standards for Criminal Justice, *Standards Relating to Pleas of Guilty* 61 (Approved Draft 1968). See also Note, *The Legitimation of Plea Bargaining: Remedies for Broken Promises*, 11 Am. Crim. L. Rev. 771, 775 (1973) and cases cited in n. 28 ("[C]ourts are rarely aware of the existence of a plea bargain").

This fact, readily apparent to even the novice at the criminal bar, has been given judicial recognition many times, as the petitioners concede in their brief at page 17 thereof (while continuing to speak of "procuring perjury" and of "bringing the prisoner and his lawyer to justice on account of their conspiracy," *id.* at 21). In *United States v. Tweedy*, 419 F.2d 192, 193 (9th Cir. 1969), the court noted that "a defendant might solemnly affirm to the court that his plea had not been induced by promises of leniency because he thought that this was all part of the game, and that honest answers would destroy the deal." In *Scott v. United States*, 419 F.2d 264 (D.C. Cir. 1969), the court proposed full disclosure of plea bargains to end the "courtroom charade in which the judge asks whether a

plea has been induced by any promises, and the defendant replies that it has not, when all the actors realize that quite the contrary is true." In *Walters v. Harris*, 460 F.2d 988, 993 (4th Cir. 1972), the court remarked:

> Examination of the defendant alone will not always bring out into the open a promise that has induced his guilty plea. It is well known that a defendant will sometimes deny the existence of a bargain that has in fact occurred . . . out of fear that a truthful response would jeopardize the bargain.

The court then quoted the statement from Trebach, supra, and held: "The danger that a Rule 11 inquiry will not uncover a plea bargain is sufficient that the defendant's responses alone to a general Rule 11 inquiry cannot be considered conclusive evidence that no bargaining has occurred." 460 F.2d at 993 (citing supporting authorities). See also *Edwards v. Garrison*, 529 F.2d 1374, 1377 (4th Cir. 1975) ("[T]he unallayed apprehensions of the accused make general inquiries about inducements unreliable in unearthing plea bargains"); *Bryan v. United States*, 492 F.2d 775, 785-86 (5th Cir. 1974) (dissenting opinion of Goldberg, J.); *Hillard v. Beto*, 465 F.2d 829, 832 (5th Cir.), petition for rehearing en banc granted, 465 F.2d 833 (5th Cir. 1972), en banc panel dissolved and case remanded to panel, 494 F.2d 34 (5th Cir.), remanded for evidentiary hearing, 494 F.2d 35 (5th Cir. 1974); *Gallegos v. United States*, 466 F.2d 740, 742 (5th Cir. 1972).

That such formal transcripts are not always conclusive was confirmed by this Court in *Fontaine v. United States*, 411 U.S. 213 (1973). In that case the district court had denied an evidentiary hearing where the petitioner had acknowledged before him at the rule

11 inquiry that his plea was given voluntarily and knowingly, that he understood the nature of the charges and the consequences of the plea, and that he was in fact guilty, but where he had alleged in his §2255 petition that his plea was coerced. The court of appeals affirmed, holding that since the requirements of rule 11 had been met, this collateral attack was *per se* unavailable. This Court reversed and in a per curiam opinion rejected the notion that the record of the inquiry is conclusive as to voluntariness and immune from collateral impeachment:

> The objective of Fed. Rule Crim. Proc. 11, of course, is to flush out and resolve all such issues, but like any procedural mechanism, its exercise is neither always perfect nor uniformly invulnerable to subsequent challenge calling for an opportunity to prove the allegations.

411 U.S. at 215. See also *United States v. Valenciano*, 495 F.2d 585 (3d Cir. 1974) (hearing required despite petitioner's "virtually herculean" burden of overcoming his negative answers to extensive plea-bargaining questions); *Roberts v. United States*, 486 F.2d 980 (5th Cir. 1973) (district court not entitled to rely solely on sentencing transcript); *Macon v. Craven*, 457 F.2d 343 (9th Cir. 1972) (district court not entitled to rely on colloquy between sentencing judge and defendant). And in *Edwards v. Garrison*, 529 F.2d 1374, 1377 n. 3 (4th Cir. 1975), the court below held, as it did in Allison's case, that "a state court's determination that a plea accepted after only general inquiry was freely and voluntarily made without evidentiary exploration of a subsequent allegation that there was an unfulfilled plea bargain is not binding on a federal court under *Townsend* . . . ."

Furthermore, the circumstances of Allison's particular case render his *pro forma* denial especially unreliable. The record that the state wants this Court to consider conclusive consists only of "yes" or "no" answers to form questions; it is not a verbatim transcript of what occurred, and one is unable to ascertain, for example, what might have been said by Allison, his attorney, the prosecutor or the court during pauses between questions or at other times in the proceeding. In was, in fact, common practice in North Carolina under the procedure represented by this record for the trial judge, prior to taking the plea, to instruct the attorney to "go over the form" with his client; or, in cases where that was not done or was inadequate to insure the "right" answers, for the attorney to whisper advice to the defendant following the judge's questions, while the judge waited patiently before proceeding to the next question. Lawyers, after all, are exceptionally talented in the art of making subtle distinctions, and many an unlearned defendant has had it convincingly explained to him that a sentencing understanding or agreement is not a "promise or threat" made to "influence" him to plead guilty, or at least that its disclosure is neither contemplated by that question nor desired by the court. The proceeding in this respect was a sham, and for the state now naively to profess shock upon hearing of such lawyer-client "conspiracies" simply ignores the realities of former North Carolina trial practice.

The present state of the record in this case is therefore not wholly inconsistent with the claim that a bargain was struck for Allison's plea; and in fact other factors point to the existence of some arrangement. Allison was charged with three felonies, to which he initially entered pleas of not guilty; yet he was later permitted to enter a plea of guilty to only the offense of attempted safecracking, and the other charges were

apparently dismissed. If the state does not fault him for failing to disclose this fact as a "promise" made to "influence" him to plead guilty, how can it assert that the record conclusively shows that no additional consideration was given for the plea?

The facts in *McCarthy v. United States*, 394 U.S. 459 (1969), are remarkably in point on this issue. There the record, reproduced in Appendix A to the opinion of the Court, reveals that the prosecutor requested the court to ask "whether or not any promises or threats have been made." The colloquy then continued:

> Mr. Sokol [defense counsel]: No, no promises or threats.
>
> The Court: I am going to ask the defendant himself. Have any promises been made to you for entering a plea of guilty?
>
> Defendant McCarthy: No, your Honor.
>
> The Court: Has anybody threatened you that if you didn't enter a plea of guilty something would happen to you?
>
> Defendant McCarthy: I beg your pardon?
>
> The Court: Has anybody threatened you to enter a plea of guilty?
>
> Defendant McCarthy: That's right, of my own volition, your Honor.

394 U.S. at 474.

But the record also reveals that McCarthy's attorney had just moved to withdraw his previously entered plea of not guilty to count two of three counts, whereupon the prosecutor acknowledged that the plea was satisfactory to the government and that the government would move to dismiss counts one and three (which it later did). 394 U.S. at 472. It would strain the credulity of the experienced criminal trial lawyer to suggest that no plea bargaining had occurred and that

the defendant did not fully expect a dismissal of counts one and three in consideration of his plea to count two, even though McCarthy had responded that no "promise" had been made. Yet the petitioners in the present case impliedly urge that he would have been bound by his answer had the government failed to dismiss the other two counts — that he would have been estopped to assert the obvious bargain. The state would foreclose a hearing on such claims, considering them invariably incredible, even though the facts in several such cases establish or strongly imply the existence of off-the-record plea arrangements.

Another such case is *Justice v. Texas*, 522 F.2d 1365 (5th Cir. 1975), where the arraignment record, which the petitioners here would consider conclusive, showed the following colloquy:

> The Court: You are not pleading guilty because of any fear, threats or coercion, any false or delusive hopes of pardon, or any promises made to you.
>
> Justice: No sir.

Yet the district court found, after an evidentiary hearing, that plea bargaining had taken place and that the defendant had not received the benefit of his bargain. The court of appeals affirmed the granting of relief, termining the question-and-answer series a "formalistic recitation," *Gallegos v. United States*, 466 F.2d 740, 742 (5th Cir. 1972), and refusing to make it conclusive of the issue. Would justice have been done if the district court had adopted the position urged by the petitioners and denied Justice an opportunity to prove the truth of his allegations?

In *United States v. Hammerman*, 528 F.2d 326 (4th Cir. 1975), the defendant alleged, and the court found, that the plea of guilty was induced by the prosecutor's covert signal to defendant's attorney that the trial judge had indicated his assent to a probationary sentence. The

court, referring to the "pressures for silence" in such situations, held that "any admission that assurances had been given would divulge judicial participation and thereby jeopardize the understanding. We find that under these circumstances Hammerman's denial of any inducement or commitment [to plead guilty] leaves untouched our determination that the assistant prosecutor's misrepresentation induced the plea." 528 F.2d at 331. The court expressly left undecided the question whether Hammerman would have been bound had the judge asked him whether any predictions had been made that the court would impose any particular sentence.

Thus the state's first "reason" for sustaining a discriminatory approach towards claims such as Allison's – their "low probability of truthfulness" (Brief for Petitioners at 19) – is not completely correct. In any event, Allison's claim, which is apparently corroborated by at least one other person, has not been shown to be untruthful in any reliable state court proceeding, and he is entitled to an evidentiary hearing on his federal petition, where the witnesses (including his attorney, whose testimony has not been sought by anyone thus far) can be examined and the truth of the matter ascertained. Certainly the bare record before the Court is not conclusive on that point, and the case illustrates the necessity for "the continuing availability of a mechanism for relief," *Kaufman v. United States*, supra, 394 U.S. at 226.

III.

A DECISION IN ALLISON'S FAVOR WILL BE OF LIMITED PRECEDENTIAL VALUE AND WILL NOT BURDEN THE STATE, SINCE NORTH CAROLINA NOW PROVIDES FOR FULL DISCLOSURE OF PLEA AGREEMENTS AND THEIR INCORPORATION INTO THE RECORD.

This Court in *McCarthy v. United States*, 394 U.S. 459 (1969), recognized that a fuller inquiry of the defendant at the time he enters his plea is more likely to ascertain the voluntariness of his acts than is the alternate remedy, suggested in that case, of shifting the burden of proof to the government at a later post-conviction hearing. In meeting its burden at such a hearing, said the Court, "the Government will undoubtedly rely upon the defendant's statement that he desired to plead guilty and frequently a statement that the plea was not induced by any threats or promises." 394 U.S. at 469. This prima facie case for voluntariness is likely to be treated as irrebuttable, since "[n]o matter how true these allegations may be, rarely, if ever, can a defendant corroborate them in a post-plea voluntariness hearing." *Id.* Instead, the Court held that the remedy would be a fuller inquiry under rule 11 as to the defendant's understanding of the nature of the charge against him – the point, rather than the existence of a plea bargain, which was there in issue.

This general remedy – fuller inquiry at trial in hopes of flushing out potential infirmities that may later be asserted – has found this Court's approval in other contexts as well. See *Boyd v. Dutton*, 405 U.S. 1 (1972) (waiver of counsel); *Boykin v. Alabama*, 395 U.S. 238 (1969) (waiver of trial rights by plea of guilty); *Jackson v. Denno*, 378 U.S. 368 (1964)

(voluntariness of confession); and *Carnley v. Cochran*, 369 U.S. 506 (1962) (waiver of counsel).

It is true, as petitioners argue (Brief for Petitioners at 22), that the record showing required by *Boykin* was intended to forestall the "spin-off of collateral proceedings," 395 U.S. at 243, but the Court also noted that a record adequate for such review can only be made if the trial judge demonstrates the "utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence." 395 U.S. at 243-44. Not being a plea-bargain case, it did not attempt to define the extent to which the trial judge must inquire into the possible existence of a plea bargain to forestall later collateral attack.

However, the state of North Carolina and the federal courts of appeals of several circuits have attempted such a delineation, and to the extent that such efforts prove successful in dispelling the pre-*Santobello* reluctance to bring plea agreements into the open and onto the record, claims such as Allison's are bound to decrease in number.

The Fourth Circuit was apparently the first to attempt a solution on the federal level to the problem of post-conviction attacks on guilty pleas on such grounds. The mechanism chosen was an expanded rule 11 inquiry by the district judge, a negative response to which would prevent subsequent litigation:

> I now inquire of the United States Attorney and of the prisoner and his counsel whether or not there have been plea negotiations. Before permitting you to respond, I advise you that the United States Supreme Court has specifically approved plea bargaining and has said it is "an essential component of the administration of justice . . . to be encouraged." You may, therefore, advise me truthfully of any plea negotiation without the slightest fear of incurring disapproval of the court.

Walters v. Harris, 460 F.2d 988, 993 (4th Cir. 1972), cert. denied sub nom. *Wren v. United States*, 409 U.S. 1129 (1973). Subsequently, the Third and Fifth Circuits followed the lead of the Fourth and required a similar expanded rule 11 inquiry. See *Paradiso v. United States*, 482 F.2d 409, 413 (3d Cir. 1973); *Bryan v. United States*, 492 F.2d 775 (5th Cir. 1974). Such an inquiry is also the solution proposed by the American Bar Association in its Standards. See American Bar Association Project on Standards for Criminal Justice, *Standards Relating to Pleas of Guilty* 6-12 (Approved Draft 1968).

Apparently in voluntary response to the Fourth Circuit's suggestion in *Walters*, the Administrative Office of the Courts of the state of North Carolina in 1974 distributed to all superior court clerks a revised plea-transcript form for negotiated pleas (Appendix C to Brief), in which the following question appeared:

> 8. I now inquire of the district attorney and of the prisoner and his counsel whether or not there have been plea negotiations. Before permitting you to respond, I advise you that the courts have specifically approved plea bargaining and have said that it is an essential component of the administration of justice to be encouraged. You should, therefore, advise me truthfully of any plea negotiations without the slightest fear of incurring disapproval of the court. Now therefore, have you agreed to plead (guilty) (nolo contendere) upon conditions?
>
> Answer_____

The form then provided a space in which the conditions could be set forth, and a further question,

"Except for the promises set out above (paragraph 9), have any promises or threats been made to you to induce you to plead (guilty) (nolo contendere) upon these conditions?"

North Carolina's efforts to encourage complete disclosure of plea agreements and to build an adequate record of guilty-plea proceedings did not end with the above administrative action. In 1975 a thorough legislative revision of North Carolina criminal procedure became effective, and Article 58 of the Criminal Procedure Act, codified as N.C. Gen. Stat. §§15A-1021 to -1027 and reproduced in Appendix A to this brief, set forth a definite procedure for the taking of guilty pleas in the superior court (the court of general jurisdiction). Plea bargaining is now specifically legitimized, and the trial judge is required to inquire of the prosecutor, the defense counsel, and the defendant personally whether there were any prior plea discussions, whether they resulted in an agreement, and what the terms of the agreement are. N. C. Gen. Stat. §15A-1022. The judge is required to advise the parties whether he approves the agreement and will dispose of the case accordingly; if he disapproves, he must give the parties an opportunity to renegotiate. N.C. Gen. Stat. §15A-1023. If the agreement is one relating to sentence and the judge at any time indicates his intention to impose a different sentence, the defendant must be informed and is entitled to a continuance of his case as a matter of right. N.C. Gen. Stat. §15A-1024. A verbatim record of the proceedings must be made, and it must include the terms of the agreement and the assent of all parties. N.C. Gen. Stat. §15A-1026.

Based on this statutory authority, North Carolina again revised its transcript of plea form in 1976 (see Appendix D, infra). The new form, applicable to all pleas whether "negotiated" or not, asks simply:

> 11. Have you agreed to plead as a part of a plea bargain? Before you answer, I advise you that the Courts have approved plea bargaining and if there is one, you may advise me truthfully without fear of incurring my disapproval.

Significantly, at the conclusion of all the questions the defendant signs a statement, under oath, that "[n]either my lawyer nor anyone else has told me to give false answers in order to have the Court accept my plea in this case."

Had such a procedure existed in North Carolina at the time Allison entered his plea (which was less than two months after the decision in *Santobello*), arguably this case would not now be before this Court; at the least, Allison would find his claim much more difficult to assert. But the very fact that the inquiry has been expanded implies that the former practice and procedure were inadequate to forestall later claims of undisclosed plea bargains. The openness of the new procedure is a salutary development to be encouraged. For the Court now to hold that the former cursory inquiry as to promises or threats was sufficient would be to tell the lawmakers of North Carolina and its court administrators that they had done a useless act. This Court should not yield to the suggestion of the petitioners that it substitute its judgment for that of the North Carolina legislature, which has remedied the problem of its own initiative and has substantially reduced the likelihood of future claims such as Allison's, or at least diminished their credibility if made.

IV.

ALLISON SHOULD NOT HAVE BEEN DENIED AN EVIDENTIARY HEARING FOR HIS FAILURE TO SUBMIT AN AFFIDAVIT FROM AN INCARCERATED CO-DEFENDANT.

As argued above, the surest way to end petitions of this type is to provide for a full and complete disclosure on the record of plea agreements. This disclosure was not sought in the present case, and North Carolina has now corrected the defect in its procedure. But there must always remain a mechanism for relief when the system of intended full disclosure malfunctions – perhaps in a situation where the judge himself is reluctant to have his assent to the agreement revealed in open court and directs counsel in chambers not to disclose all or part of it, or where law enforcement officials seek to preserve the confidentiality of a proposed informant about to enter a negotiated plea. While admittedly many later claims of unenforced plea bargains will ultimately be found to be without merit, only an extreme cynic would contend that all of them are baseless. A hearing on the merits is a small premium for the insurance that constitutional rights will remain protected.

The magistrate in Allison's case, however, attempted to avoid the inconvenience of a hearing by requiring him to submit an affidavit from his co-defendant, who was then serving a sentence in other institutions. "[T]his Court has emphasized, taking into account the office of the writ and the fact that the petitioner, being in custody, is usually handicapped in developing the evidence needed to support in necessary detail the facts alleged in his petition, that a habeas corpus proceeding must not be allowed to founder in a 'procedural

morass.'" *Harris v. Nelson*, 394 U.S. 286, 291-92 (1969). It is submitted that it is singularly inappropriate to place upon an indigent state prisoner, proceeding *pro se*, the burden of procuring the affidavit of another prisoner, upon penalty of having his claims dismissed. In this case, a "procedural morass" was the result.

The magistrate's directive to Allison presumed a willing witness; it required him to perform an act beyond his control as a condition to asserting a facially valid claim of deprivation of constitutional right. It must be remembered that Laster, the witness, was the very man who had changed his plea and agreed to testify against the respondent, inducing him to plead guilty. Further, Laster had, according to Allison and to Laster's own purported statement, received less than the statutory minimum for the offense of which he was convicted, and he may have had some understandable reluctance to "rock the boat." Laster may simply not have been concerned enough with Allison's fate to trouble himself with an affidavit; he may not have known what one was, or how to make it; his ability to receive mail from other inmates may have been restricted; he may have been concerned (as Allison suggested in his letter to the court) that his custodians would resent him for it and would deny him the minor rewards and privileges associated with satisfactory behavior in our penal system (he was asked, after all, to appear before a prison notary to aid another prisoner in a civil action entitled "Allison v. Blackledge, Warden . . . ."

The point is that one cannot assume the easy availability of such supporting material, at least not so certainly as to fashion from it a "threshold requirement," as the petitioners urge. Not all prisoners may have their plea discussions witnessed; and not all witnesses may willingly furnish affidavits, as this case illustrates.

> A rule requiring something other than the petitioner's own affidavit as a prerequisite to going behind the official transcripts has a certain surface attraction. Nothing in the statute commands such a rule and the realities of prison life suggest that a per se rule might unreasonably and unnecessarily restrict access to the §2255 remedy. More important, *Machibroda* seems clearly to allow a hearing on the strength of the petitioner's own affidavit without supporting papers.

Bryan v. United States, 492 F.2d 775, 783 (5th Cir. 1974) (Goldberg, J., dissenting).

What required Allison months of effort, presumably by his family as his liaison with a reluctant co-defendant, could have been obtained by the state Attorney General's office with little more than a telephone call to the co-defendant's prison unit and possibly another to the attorney who represented Allison at trial. The court below was correct in holding that it was error to place this burden on the respondent.

Respondent concedes that the workload of the federal district courts would be diminished if this class of litigants were barred from the courtroom as petitioners suggest in their brief at 19-20, but this Court has consistently rejected claims of administrative convenience as a justification for unconstitutional distinctions between classes of similarly situated persons. See *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Reed v. Reed*, 404 U.S. 71 (1971); *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Carrington v. Rash*, 380 U.S. 69 (1965). "[T]he Constitution recognizes higher values than speed and efficiency." *Stanley v. Illinois*, 405 U.S. 645, 656 (1972).

In *Reed*, supra, the Court unanimously rejected reduction of the workload on the probate courts of Idaho as a justification for an otherwise improper

distinction between classes of petitioners. Such a distinction, "merely to accomplish the elimination of hearings on the merits," was found arbitrary. 404 U.S. at 76. Such holdings can always be distinguished, of course, but it would be unseemly for the federal judiciary to justify reduction of its workload at the expense of a class of litigants, while rejecting such reasons when advanced by other agencies of government. This is particularly so when the interests sought to be asserted are fundamental rights guaranteed under the Constitution, rather than mere statutory entitlements to welfare benefits, military allowances, or the right to administer a decedent's estate. "There is no higher duty of a court, under our constitutional system, than the careful processing and adjudication of petitions for writs of habeas corpus . . . ." *Harris*, supra, 394 U.S. at 292.

The state urges that because few prisoners ultimately prevail in their claims (perhaps because of the very judicial hostility it cites), all should be barred from seeking relief – that this Court should establish a "doctrine of non-review" to this class of petitions (Brief for Petitioners at 19-20). It is true that the increasing number of such claims has threatened to produce a judicial insensitivity to habeas corpus petitions, as was recognized by Mr. Justice Powell in his dissenting opinion in *Boyd v. Dutton*, 405 U.S. 1, 8 (1972). But judicial insensitivity to any class of litigant is to be avoided (the point of the dissent), not lauded as the state suggests.

In any event, it is uncertain what benefits would accrue from transfer of the potential for insensitivity from the trial to the appellate stage through establishment of the "higher threshold requirement" proposed by petitioners (Brief for Petitioners at 20), since it is not suggested how the appellate courts could avoid

review of each case to determine whether the threshold has been met and was appropriately required. The expense and inconvenience of appellate litigation is thereby substituted for a simple hearing at the trial level. "The exhumation and resurrection of viable prisoner complaints which have been summarily given final rites and buried by district courts has become a major occupation of this Court." *Covington v. Cole*, 528 F.2d 1365 (5th Cir. 1976) (Goldberg, J., in the context of §1983 complaints). In addition, the appellate courts themselves have recognized in many cases that there are limits to the claims that are considered worthy of a hearing. See, e.g., *Edmonds v. Lewis*, No. 75-2308 ___ F.2d ___ (4th Cir. December 3, 1976); *Clayton v. Estelle*, 541 F.2d 486 (5th Cir. 1976), and cases therein cited; *Crawford v. United States*, 519 F.2d 347 (4th Cir. 1975). In each of these cases, distinguishable from Allison's on their facts, an evidentiary hearing was not required. Cf. also the report of the Director of the Administrative Office of the United States Courts cited in *Wingo v. Wedding*, 418 U.S. 416, 473 n. 20 (1974) (less than five per cent of habeas corpus petitions in 1973 required hearings; of those that did, eighty-eight per cent were completed in one day or less).

Even if affidavits are deemed useful in establishing a higher threshold for habeas petitioners, they are not a substitute for an evidentiary hearing where the ultimate disposition of the case will likely turn on questions of credibility.

> Where an unresolved factual dispute exists, demeanor evidence is a significant factor in adjudging credibility. An questions of credibility, of course, are basic to resolution of conflicts in testimony. To be sure, the state-court record is competent evidence, and either party may choose to rely solely upon the evidence contained in that record,

> but the petitioner, and the State, must be given the opportunity to present other testimonial and documentary evidence relevant to the disputed issues.

Townsend v. Sain, 372 U.S. 293, 322 (1963). See also *United States v. Yellow Cab Co.*, 338 U.S. 338, 341 (1949); *Caputo v. Henderson*, 541 F.2d 979, 984 (2d Cir. 1976); *Coleman v. Wilson*, 401 F.2d 536 (9th Cir. 1968), cert. denied sub nom. *Nelson v. Coleman*, 393 U.S. 1065; (cannot resolve conflict between allegations of petition and former lawyer's affidavit without evidentiary hearing).

In this case, the trier of fact ought at a minimum to hear the testimony of Allison, the co-defendant Laster, Allison's lawyer, and perhaps the prosecuting attorney. Only in the relatively unlikely event that the versions of all of these potential witnesses coincide would summary disposition be appropriate. Affidavits may serve to put factual disputes in clearer focus, but conflicting claims of historical fact cannot thereby be settled. Hopefully no one would be so cynical as to suggest that in every case of conflicting assertions by a prisoner and his former counsel or his prosecutor, the latter ought automatically to be believed and the petitioner disbelieved; yet that is the implication in requiring that each side submit affidavits, on the basis of which the case will be adjudicated. The "insidious suggestion" of "trial by affidavit," *Raines v. United States*, 423 F.2d 526, 533 (4th Cir. 1970) (Sobeloff, J., dissenting), has been rejected in many cases. *Walker v. Johnston*, 312 U.S. 275, 286-87 (1941) ("Not by the pleadings and the affidavits, but by the whole of the testimony, must it be determined whether the petitioner has carried his burden of proof and shown his right to a discharge."); *United States ex rel. Hill v. Ternullo*, 510 F.2d 844, 847 (2d Cir. 1975); *Del Piano v. United States*, 362

F.2d 931, 933 (3d Cir. 1966) ("The factual issue may not be determined solely on the counter-affidavits submitted by the Government and in total disregard of the movant's affidavit.")

In closing, respondent will briefly reply to some of the petitioners' remaining assertions. The first is their suggestion that damage will be done to "equitable principles" if relief is granted in a situation where the state is not "at fault." (Brief for Petitioners at 21). Aside from the damage done if valid claims of unconstitutional detention are not heard on their merits, the respondent submits that it is inappropriate to discuss the issue in terms of an analysis of relative fault. The question in each case is whether an admission of guilt predicated upon an unfulfilled expectation of leniency is voluntary and fair. The petitioners have simply misunderstood the proper function of the state in administering criminal justice.

Petitioners also bring forward in passing another argument more vigorously advanced below, deliberate by-pass of state remedies (Brief for Petitioners at 21). The state, however, admitted in its answer to Allison's petition that he had exhausted his state remedies, and in any event the doctrine applies only to the failure to exhaust remedies that are still open to the habeas applicant at the time he files his application in federal court. *Fay v. Noia*, 372 U.S. 391, 435 (1963). The "remedy" that Allison by-passed, according to the state, was that of volunteering to the judge, possibly contrary to his counsel's instructions, his expectation of a ten-year sentence (and for all the record shows, he might have done so, since nothing is known about what he said at sentencing). This failure is hardly the "intentional relinquishment or abandonment of a known right or privilege" established by *Fay* as the controlling standard. Further, there has been no hearing

in federal court to find the facts bearing on Allison's alleged default, as *Fay* explicitly requires. 372 U.S. at 439. See also *Humphrey v. Cady*, 405 U.S. 504, 517 (1971).

"Finally, petitioners raise the spectre of wholesale invalidation of the guilty pleas of the worst offenders in North Carolina if Allison's claim is sustained. This concern is not well founded; if those who pleaded guilty prior to 1974 have not yet uttered a word of protest that an alleged bargain was broken, how likely is it now that they will? And if they do, how credible are their assertions likely to be? This is the reason "North Carolina is not in a floodgates situation on this type of claim at this time," Brief for Petitioners at 22 n.6.

CONCLUSION

It has been nearly five years now since Allison first presented to the courts a facially valid claim of unconstitutional treatment, but he has not yet been granted even the opportunity to have the truth of his sworn allegation determined through the testimony of witnesses. The state has offered no sound reason why he should not be granted his day in court, and the court of appeals was correct in holding that he is entitled to this much. Its judgment should not be disturbed.

Respectfully submitted,

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APPENDIX "A"

NORTH CAROLINA GENERAL STATUTES

ARTICLE 58.

Procedures Relating to Guilty Pleas in Superior Court.

§15A-1021. *Plea conference; improper pressure prohibited; submission of arrangement to judge.*

(a) In superior court, the prosecution and the defense may discuss the possibility that, upon the defendant's entry of a plea of guilty or no contest to one or more offenses, the solicitor will not charge, will dismiss, or will move for the dismissal of other charges, or will recommend or not oppose a particular sentence. If the defendant is represented by counsel in the discussions the defendant need not be present. The trial judge may participate in the discussions.

(b) No person representing the State or any of its political subdivisions may bring improper pressure upon a defendant to induce a plea of guilty or no contest.

(c) If the parties have reached a proposed plea arrangement in which the solicitor has agreed to recommend a particular sentence, they may, with the permission of the trial judge, advise the judge of the terms of the arrangement and the reasons therefor in advance of the time for tender of the plea. The judge may indicate to the parties whether he will concur in the proposed disposition. The judge may withdraw his concurrence if he learns of information not consistent with the representations made to him.

§15A-1022. *Advising defendant of consequences of guilty plea; informed choice; factual basis for plea; admission of guilt not required.*

(a) Except in the case of corporations or in misdemeanor cases in which there is a waiver of appearance under G.S. 15A-1011(a)(3), a superior court judge may not accept a plea of guilty or no contest from the defendant without first addressing him personally and:

(1) Informing him that he has a right to remain silent and that any statement he makes may be used against him;
(2) Determining that he understands the nature of the charge;
(3) Informing him that he has a right to plead not guilty;
(4) Informing him that by his plea he waives his right to trial by jury and his right to be confronted by the witnesses against him;
(5) Determining that the defendant, if represented by counsel, is satisfied with his representation; and
(6) Informing him of the maximum possible sentence on the charge, including that possible from consecutive sentences, and of the mandatory minimum sentence, if any, on the charge.

(b) By inquiring of the solicitor and defense counsel and the defendant personally, the judge must determine whether there were any prior plea discussions, whether the parties have entered into any arrangement with respect to the plea and the terms thereof, and whether any improper pressure was exerted in violation of G.S. 15A-1021(b). The judge may not accept a plea of guilty or no contest from a defendant without first determining that the plea is a product of informed choice.

(c) The judge may not accept a plea of guilty or no contest without first determining that there is a factual basis for the plea. This determination may be based upon information including but not limited to:

(1) A statement of the facts by the solicitor.
(2) A written statement of the defendant.
(3) An examination of the presentence report.
(4) Sworn testimony, which may include reliable hearsay.
(5) A statement of facts by the defense counsel.

(d) The judge may accept the defendant's plea of no contest even though the defendant does not admit that he is in fact guilty if the judge is nevertheless satisfied that there is a factual basis for the plea. The judge must advise the defendant that if he pleads no contest he will be treated as guilty whether or not he admits guilt.

§15A-1023. *Action by judge in plea arrangements relating to sentence; no approval required when arrangement does not relate to sentence.*

(a) If the parties have agreed upon a plea arrangement pursuant to G.S. 15A-1021 in which the solicitor has agreed to recommend a particular sentence, they must disclose the substance of their agreement to the judge at the time the defendant is called upon to plead.

(b) Before accepting a plea pursuant to a plea arrangement in which the solicitor has agreed to recommend a particular sentence, the judge must advise the parties whether he approves the arrangement and will dispose of the case accordingly. If the judge rejects the arrangement, he must so inform the parties, refuse to accept the defendant's plea of guilty or no contest, and advise the defendant personally that neither the State nor the defendant is bound by the rejected arrangement. The judge must advise the parties of the reasons he rejected the arrangement and afford them an opportunity to modify the arrangement accordingly. A decision by the judge disapproving a plea arrangement is not subject to appeal.

(c) If the parties have entered a plea arrangement relating to the disposition of charges in which the

solicitor has not agreed to make any recommendations concerning sentence, the substance of the arrangement must be disclosed to the judge at the time the defendant is called upon to plead. The judge must accept the plea if he determines that the plea is the product of the informed choice of the defendant and that there is a factual basis for the plea.

§15A-1024. *Withdrawal of guilty plea when sentence not in accord with plea arrangement.*

If at the time of sentencing, the judge for any reason determines to impose a sentence other than provided for in a plea arrangement between the parties, the judge must inform the defendant of that fact and inform the defendant that he may withdraw his plea. Upon withdrawal, the defendant is entitled to a continuance until the next session of court.

§15A-1025. *Plea discussion and arrangement inadmissible.*

The fact that the defendant or his counsel and the solicitor engaged in plea discussions or made a plea arrangement may not be received in evidence against or in favor of the defendant in any criminal or civil action or administrative proceedings.

§15A-1026. *Record of proceedings.*

A verbatim record of the proceedings at which the defendant enters a plea of guilty or no contest and of any preliminary consideration of a plea arrangement by the judge pursuant to G.S. 15A-1021(c) must be made and transcribed. This record must include the judge's advice to the defendant, and his inquiries of the defendant, defense counsel, and the solicitor, and any responses. If the plea arrangement has been reduced to writing, it must be made a part of the record; otherwise the judge must require that the terms of the arrangement be stated for the record and that the

assent of the defendant, his counsel, and the solicitor be recorded.

§15A-1027. *Limitation on collateral attack on conviction.*

Noncompliance with the procedures of this Article may not be a basis for review of a conviction after the appeal period for the conviction has expired, unless the review is expressly authorized by S.S. 15-217.

1b

File # _____
Film # _____
In The General Court of Justice
_____ Court Division

STATE OF NORTH CAROLINA
County of_____

STATE OF NORTH CAROLINA

vs.

_____

APPENDIX "B"

TRANSCRIPT OF PLEA

The Defendant, being first duly sworn, makes the following answers to the questions asked by the Presiding Judge:

1. Are you able to hear and understand my statements and questions? Answer:_____
2. Are you now under the influence of any alcohol, drugs, narcotics, medicines, or other pills? Answer:_____
3. Do you understand that you are charged with the (felony) (misdemeanor) of _____ _____ _____? Answer:_____
4. Has the charge been explained to you, and are you ready for trial? Answer:_____
5. Do you understand that you have the right to plead not guilty and to be tried by a Jury? Answer:_____
6. How do you plead to these charges - Guilty, not Guilty, or nolo contendere? Answer:_____
7. (a) Are you in fact guilty? (Omit if plea is nolo contendere) Answer:_____
   (b) (If applicable) Have you had explained to you and do you understand the meaning of a plea of nolo contendere? Answer:_____
8. Do you understand that upon your plea of (guilty) (nolo contendere) you could be imprisoned for as much as _____ (months) (years)? Answer:_____
9. Have you had time to subpoena witnesses wanted by you? Answer:_____
10. Have you had time to talk and confer with and have you conferred with your lawyer about this case, and are you satisfied with his services? Answer:_____
11. Has the Solicitor, or your lawyer, or any policeman, law officer or anyone else made any promise or threat to you to influence you to plead (guilty) (nolo contendere) in this case? Answer:_____
12. Has anyone violated any of your constitutional rights? Answer:_____
13. Do you now freely, understandingly and voluntarily authorize and instruct your lawyer to enter on your behalf a plea of (guilty) (nolo contendere)? Answer:_____
14. Do you have any questions or any statement to make about what I have just said to you? Answer:_____

I have read or heard read all of the above questions and answers and understand them, and the answers shown are the ones I gave in open Court, and they are true and correct.

_____
Defendant

Sworn to and subscribed before me this_____day of_____, 19___.

_____
Clerk Superior Court

AOC-L Form 158
Rev 10/69

(over)

ADJUDICATION

The undersigned Presiding Judge hereby finds and adjudges:

I. That the defendant, _____, was sworn in open Court and the questions were asked him as set forth in the Transcript of Plea by the undersigned Judge, and the answers given thereto by said defendant are as set forth therein.

II. That this defendant, was represented by attorney, _____, who was (court appointed) (privately employed); and the defendant through his attorney, in open Court, plead (guilty), (nolo contendere) to _____

_____

as charged in the (warrant) (bill of indictment) (the lesser offense), of _____

_____

and in open Court, under oath, further informs the Court that:

1. He is and has been fully advised of his rights and the charges against him;
2. He is and has been fully advised of the maximum punishment for said offense(s) charged, and for the offense(s) to which he pleads (guilty) (nolo contendere);
3. He is guilty of the offense(s) to which he pleads guilty;
4. He authorizes his attorney to enter a plea of (guilty) (nolo contendere) to said charge(s)
5. He has had ample time to confer with his attorney, and to subpoena witnesses desired by him;
6. He is ready for trial;
7. He is satisfied with the counsel and services of his attorney;

And after further examination by the Court, the Court ascertains, determines and adjudges, that the plea of (guilty) (nolo contendere), by the defendant is freely, understandingly and voluntarily made, without undue influence, compulsion or duress, and without promise of leniency. It is, therefore, ORDERED that his plea of (guilty) (nolo contendere) be entered in the record, and that the Transcript of Plea and Adjudication be filed and recorded.

This_____day of_____, 19___.

_____
Judge Presiding

APPENDIX "C"

STATE OF NORTH CAROLINA
County of _____

File #_____
Film #_____
In The General Court of Justice
_____ Court Division

STATE OF NORTH CAROLINA
vs.
_____

TRANSCRIPT OF NEGOTIATED PLEA

The defendant, being first duly sworn, makes the following answers to the questions asked by the Presiding Judge:

1. Are you able to hear and understand my statements and questions? Answer _____
2. Are you now under the influence of any alcohol, drugs, narcotics, medicines, or other pills?
   Answer _____
3. Do you understand that you are charged with the (felony)(misdemeanor) of _____
   _____
   _____? Answer _____
4. Has the charge been explained to you? Answer _____
5. Do you understand that upon your plea of (guilty)(nolo contendere) you could be imprisoned for as much as _____ (months)(years)?
   Answer _____
6. Do you understand that you have the right to plead not guilty and to be tried by a Jury?
   Answer _____
7. Have you had time to talk and confer with and have you conferred with your lawyer about this case and are you satisfied with his services?
   Answer _____
8. I now inquire of the district attorney and of the prisoner and his counsel whether or not there have been plea negotiations. Before permitting you to respond, I advise you that the courts have specifically approved plea bargaining and have said that it is an essential component of the administration of justice to be encouraged. You should, therefore, advise me truthfully of any plea negotiations without the slightest fear of incurring disapproval of the court. Now therefore, have you agreed to plead (guilty) (nolo contendere) upon conditions?
   Answer _____
9. Are these the conditions and all of them? _____
   _____
   _____
   _____
   _____
   _____
   _____
   _____
   _____. Answer _____
10. Except for the promises set out above (paragraph 9), have any promises or threats been made to you to induce you to plead (guilty)(nolo contendere) upon these conditions?
    Answer _____
11. Do you now freely, voluntarily and understandingly authorize and instruct your lawyer to enter on your behalf a plea of (guilty)(nolo contendere) upon the conditions above set out?
    Answer _____
12. Do you have any questions or any statement to make at this time about what I have just said to you?
    Answer _____

[OVER]

I have read or heard read all of the questions and answers on the reverse hereof and understand them, and the answers shown are the ones I gave in open Court, and they are true and correct, and the basis for the negotiated plea of (guilty)(nolo contendere) as stated on the reverse hereof is accurate and is the basis upon which I entered this plea of (guilty)(nolo contendere).

_____ _____
Date Defendant

Sworn to and subscribed before me this _____ day of _____, 19___.

_____
Clerk of Superior Court

As attorney for the defendant, _____, I hereby certify that the conditions stated on the reverse hereof (paragraph 9) upon which the defendant's plea of (guilty)(nolo contendere) was entered are correct and they are the conditions agreed to by the defendant and myself as his attorney upon which the defendant's plea of (guilty)(nolo contendere) was entered.

_____ _____
Date Attorney for Defendant

As district attorney for the _____ Judicial District, I hereby certify that the conditions stated on the reverse hereof (paragraph 9) are the conditions agreed to by the defendant and his counsel and myself for the entry of the plea of (guilty)(nolo contendere) by the defendant to the charge in this case.

_____ _____
Date District Attorney

ADJUDICATION

The undersigned Presiding Judge upon examination of the record proper and hearing statement of counsel for the defendant and the district attorney, and upon considering the evidence offered, makes the following findings:

1. That the conditions of the negotiated plea of (guilty)(nolo contendere) are reasonable and the acceptance and approval of the plea of (guilty)(nolo contendere) by the court would be to the best interest of the defendant and society and the administration of justice.

2. That substantial evidence has been produced to support the charge.

3. That the negotiated plea of (guilty)(nolo contendere) was entered into by the defendant after consultation with counsel and with advice of counsel and that he did so freely, voluntarily and with full knowledge of the consequences.

Upon the foregoing findings, the defendant's plea of (guilty)(nolo contendere) is hereby accepted by the Court.

This _____ day of _____, 19_____.

_____
Judge Presiding

STATE OF NORTH CAROLINA File # _____

County of _____ **APPENDIX "D"** File # _____

In The General Court of Justice

State of North Carolina Vs. _____ Court Division

_____

TRANSCRIPT OF PLEA

The defendant, having tendered a plea of _____ and being first duly sworn, makes the following answers to the questions asked by the Presiding Judge:

1. Are you able to hear and understand me? Answer _____
2. Do you understand that you have the right to remain silent and that any statement you make may be used against you? Answer _____
3. Are you now under the influence of alcohol, drugs, medicines, pills, or any other intoxicants? Answer _____
4. Have you discussed your case fully with your lawyer and are you satisfied with his services? Answer _____
5. Do you understand that you are pleading (guilty)(no contest) to the felonies of _____ _____ _____? misdemeanors of _____ _____? Answer _____
6. Have the charges been explained to you by your attorney and do you understand the nature of the charges? Answer _____
7. Do you understand that upon your plea you could be imprisoned for a maximum of _____ years _____ months (and that the mandatory minimum sentence is _____)? Answer _____
8. Do you understand that you have the right to plead not guilty and be tried by a jury and be confronted by the witnesses against you, and by this plea you give up these and your other constitutional rights relating to trial by jury? Answer _____
9. Do you now plead (guilty)(no contest)? Answer _____
10. (a) [If applicable] Are you in fact guilty? Answer _____
    (b) [If applicable] Do you understand that upon your plea of no contest you will be treated as guilty whether or not you admit your guilt? Answer _____
11. Have you agreed to plead as a part of a plea bargain? Before you answer, I advise you that the Courts have approved plea bargaining and if there is one, you may advise me truthfully without fear of incurring my disapproval. Answer _____
12. [If applicable] The District Attorney and your counsel have informed the Court that these are all the terms and conditions of your plea: _____

_____
_____
_____
_____
_____
_____
_____
_____
_____
_____
_____
_____

(a) Is this correct? Answer _____ (b) Do you accept this arrangement? Answer _____

(Continued on Reverse)

TRANSCRIPT OF PLEA (continued)

13. [Other than what I have just said] has anyone made you any promises or threatened you in any way to cause you to enter this plea? Answer _____

14. Do you enter this plea of your own free will, understanding what you are doing? Answer _____

15. Do you have any questions about what I have just said to you? Answer _____

I am _____ years of age and completed the _____ grade of school.

I have read or have heard read all of these questions and understand them. The answers shown are the ones I gave in open court and they are true and accurate. Neither my lawyer nor anyone else has told me to give false answers in order to have the Court accept my plea in this case. The conditions of the plea as stated on the reverse hereof, if any, are accurate.

_____ _____
Date Defendant

Sworn to and subscribed before me this _____ day of _____, 19 _____.

_____
Clerk of Superior Court

* * * * * * * * * * * * * *

As Attorney for the defendant, _____, I hereby certify that the conditions stated on the reverse hereof, if any, upon which the defendant's plea was entered are correct and they are agreed to by the defendant and myself upon which the defendant's plea was entered. I further certify that I have fully explained to the defendant the nature and elements of the charges to which he is pleading.

_____ _____
Date Attorney for Defendant

As prosecutor for the _____ Judicial District, I hereby certify that the conditions stated on the reverse hereof, if any, are the terms agreed to by the defendant and his counsel and myself for the entry of the plea by the defendant to the charge in this case.

_____ _____
Date Prosecutor

* * * * * * * * * * * * * * * * * * * *

PLEA ADJUDICATION

Upon consideration of the record proper, evidence presented, answers of defendant, and statements of counsel for the defendant and the prosecutor, the undersigned finds:

1. That there is a factual basis for the entry of the plea.

2. That the defendant is satisfied with his counsel.

3. That the plea is the informed choice of the defendant and is made freely, voluntarily, and understandingly.

The defendant's plea is hereby accepted by the Court and is ordered recorded.

This _____ day of _____, 19_____.

_____
Presiding Judge